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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS
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No. PD-0577-18
In the
Court of Criminal Appeals of Texas
At Austin

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No. 01-17-00421-CR
In the First District Court of Appeals
Of Harris County, Texas

———♦———

No. 1528845
263rd District Court
Of Harris County, Texas

———♦———

STEVEN R. CURRY
Appellant
V.
THE STATE OF TEXAS
Appellee

———♦———

STATE'S MOTION FOR REHEARING

———♦———

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IDENTIFICATION OF THE PARTIES

Pursuant to Texas Rule of Appellate Procedure 38.1(a) and 38.2(a)(1)(A), a complete list of the names of all interested parties is provided below so that the members of this Honorable Court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of the case.

Counsel for the State:

Kim Ogg — District Attorney of Harris County

Jessica Caird — Assistant District Attorney on appeal

Allison Buess — Assistant District Attorney at trial

Appellant or criminal defendant:

Steven R. Curry

Counsel for Appellant:

Carl Haggard — Defense attorney at trial

Crespin Michael Linton — Appellate attorney

Trial Judge:

Honorable Jim Wallace — Judge Presiding

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TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

The State of Texas**,** pursuant to Texas Rule of Appellate Procedure 79.1 respectfully requests that this Court reconsider its October 30, 2019 opinion, and grant the State's Motion for Rehearing. In a published opinion, this Court reversed the First Court of Appeals' decision affirming the trial court's ruling not to give appellant's proposed mistake-of-fact jury instruction.[1] The State asks the Court to reconsider its holding because appellant's written proposed instruction and reason proffered in the trial court presented a different mistaken belief than the one identified by this Court in support of the instruction.[2] The mistaken fact this court relied upon to reverse the lower court does not comport with the one appellant claimed in the trial court.

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[1] *See Curry v. State*, PD-0577-18, __S.W.3d __ (Tex. Crim. App. Oct. 30, 2019); *see also Curry v. State*, 569 S.W.3d 163 (Tex. App.—Houston [1st Dist.] 2018).

[2] The appellate record consists of the following:
CR-Clerk's Record;
RRI-RRVII-Reporter's Record from March 31 through April 4, 2017, prepared by Marcia E. Barnett.

GROUND FOR REHEARING

> Should this Court have relied upon an alternate mistaken belief to reverse the First Court of Appeals than the one appellant proffered to the trial court when he requested the mistake-of-fact instruction?

STATEMENT OF CASE

This Court granted review of the appellant's two issues raised in a petition for discretionary review, namely whether: (1) the Court of Appeals erred by finding sufficient evidence to support appellant's conviction for failure to stop and render aid, and (2) whether the Court of Appeals erred in affirming the trial court's refusal to give a mistake-of-fact jury instruction. It found the evidence sufficient.[3] It also held that the trial court erred when it did not give a mistake of fact instruction because the *mens rea* of the failure to stop and render aid charge included knowledge that the accident injured someone, knowledge that the accident resulted in a person's death, or that the accident was reasonably likely to injure or kill someone.[4] This Court issued a published opinion reversing the Court of Appeals' judgment on October 30, 2019, and remanded for the appellate court to

[3] *Curry*, slip op. at 15.
[4] *Curry*, slip op. at 16-17.

assess harm.[5] The State now timely moves for rehearing based on a comportment issue.

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STATE'S SOLE GROUND FOR REHEARING

> Should this Court have relied upon an alternate mistaken belief to reverse the First Court of Appeals than the one appellant proffered to the trial court when he requested the mistake-of-fact instruction?

I. Appellant must preserve his complaint for appeal by requesting the defensive jury instruction and specifying the reason the trial court must give it.

This Court held in *Posey v. State* that the defendant had the burden to make a timely and adequate request or objection to preserve his request for a defensive jury instruction.[6] *Posey*'s holding prevented a party from "sandbagging" the trial judge when it failed to appraise him and the State of the defensive instruction requested and, more particularly, how the law entitled him to it.[7] As this Court explained in *Tolbert v. State*, the Court's "decision in *Posey* was intended 'to discourage parties from sandbagging or lying behind the log' and to discourage a

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[5] *Curry*, slip op. at 17-18.

[6] *See Mays v. State*, 318 S.W.3d 368, 382-3 (Tex. Crim. App. 2010) (citing *Posey v. State*, 966 S.W.2d 57 (Tex. Crim. App. 1998)).

[7] *Id*. at 383 (*citing Posey*, 966 S.W.2d at 63; *Tolbert v. State*, 306 S.W.3d 776, 780, n. 6 (Tex. Crim. App. 2010).

defendant from retrying the case on appeal under a new defensive theory, effectively giving the defendant 'two bites at the apple.'"[8]

Not only must the defendant timely seek the instruction in the trial court, he must also support his request with the reason why the law entitles him to it.[9] This Court has long held that a defendant's theory in the trial court for his request or objection must comport with the argument on appeal or he preserved nothing for review.[10] In *Goff v. State*, it held the appellant did not preserve error to his request when his complaint in the trial court failed to inform the trial judge of the error he later complained about on appeal.[11] "Where his trial objections do not comport with his arguments on appeal, appellant has failed to preserve error on those issues."[12] The *Goff* Court followed a previous decision in *Satterwhite v. State* that held the defendant did not preserve error to his jury charge objection when his

[8] *Tolbert*, 306 S.W.3d at 780, n. 6.

[9] *See Mays*, 318 S.W.3d at 383 (holding appellant failed to tell the judge the specific fact that entitled him to a mistake-of-fact instruction, and thus he failed to properly preserve his request for the instruction); Tex. R. App. P. 33.1(a) (requiring as a prerequisite to raising the complaint on appeal that the party timely object and state the grounds for the requested ruling with sufficient specificity to make the trial court aware of the complaint, unless the specific ground is apparent from the context).

[10] *Goff v. State*, 931 S.W.2d 537, 551 (Tex. Crim. App. 1996) (citing former Tex. R. App. P. 52(a), now Tex. R. App. P. 33.1; *Satterwhite v. State*, 858 S.W.2d 412, 430 (Tex. Crim. App. 1993)).

[11] *Id.*

[12] *Id.* (citations omitted).

theory on appeal differed from the one proffered in the trial court as the basis for his objection.[13]

II. Appellant's theory in the trial court rested on a written, requested jury instruction about a mistaken belief that he was not involved in an accident.

The theory upon which this Court reversed the lower court differed from the one appellant proffered in support for his mistake-of-fact instruction in the trial court. Appellant described to the trial court in the pretrial conference, in the charge conference, and in his written instruction, the mistaken fact as that he did not believe he was in an accident.[14] Yet, this Court held as the reason for the reversal:

> The accident must have resulted in injury to or the death of another person, or must be the type of accident that was reasonably likely to have injured or killed another person. Consequently, the question is not whether Curry knew that he was involved in some kind of accident (he admitted that he was); it is whether he made a reasonable mistake in thinking that no one involved in the accident was injured or killed or in thinking that the accident was not reasonably likely to have injured or killed another person.[15]

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[13] *Satterwhite*, 858 S.W.2d at 430 (citing Tex. R. App. P. 52(a), later rewritten as Tex. R. App. P. 33.1); *see also Mendez v. State*, 138 S.W.3d 334, 343 (Tex. Crim. App. 2004) (explaining that Rule 52 was rewritten and renumbered as 33.1, and showing the text of Rule 52 which comports with 33.1(a)'s requirement for objection with the specific grounds in support stated by the party when the reason is not apparent from the context).

[14] (CR-388-389; RRII-8, 12; RRV-90-91) (claiming as the mistaken fact that he did not believe he had been in an accident).

[15] *Curry*, slip op. at 16.

The change in appellant's theory from a mistaken belief that no accident occurred to the one that claimed he knew an accident occurred, but he did not reasonably believe he had injured a person sandbags the trial judge and the State because it was not the reason given for the mistake-of-fact instruction in the trial court.[16] Appellant's written requested mistake-of-fact instruction shows the difference in theories.[17] Appellant wanted the charge to read, "You have heard evidence that the Defendant did not believe that he had been in an accident but that someone had intentionally thrown an object that struck the right headlight fixture area of the truck he was driving."[18] It went on to ask the jury to decide whether the State had proved beyond a reasonable doubt: (1) "the Defendant did not believe that someone had thrown an object that struck the right headlight area of the truck he was driving; or" (2) "the Defendant's belief that someone had thrown an object that struck the right headlight fixture area of the truck he was driving was not reasonable."[19] Appellant's written instruction did not claim as the mistake of fact that he was in an accident he did not reasonably believe was likely to have hurt or killed someone.[20]

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[16] (CR-388-389; RRII-8, 12; RRV-90-91) (claiming as appellant's mistaken fact that he did not believe he had been in an accident).
[17] (CR-388-89).
[18] (CR-388).
[19] *Id*.
[20] *See id*.

Appellant included a short memorandum with his written jury instruction request that cited *Goforth v. State*.[21] He argued the case stood "for the proposition that a *'mens rea'* can never be disposed of in [failure to stop and render aid]…cases and that if the issue of whether or not the accused knew or reasonably should have known, or was mistaken, that a vehicle he was driving was *in an 'accident' to begin with*, the Court must charge the [j]ury accordingly."[22]

III. Counsel's comments about evidentiary support did not expand the theory upon which he sought the particular mistake-of-fact instruction he proposed to the trial court.

In the pretrial conference that discussed motions in limine, defense counsel described the *mens rea* of failure to stop and render aid as knowing "number one, that he was involved in an accident. Number two says it's apparent that someone might be injured. And that's the crux of this case, that's what we have always contended that my client did: That he was not aware that a 'accident' had occurred or that it was apparent that someone might be involved."[23] During the same conference, counsel reiterated the question was not one of fault, but whether because of the complainant's roadway position appellant "would not have known that he was in an 'accident.'"[24]

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[21] (CR-389) (citing *Goforth v. State*, 92 Tex. Crim. 200, 241 S.W. 1027 (1922)).
[22] (CR-389) (emphasis added).
[23] (RRII-8).
[24] (RRII-12).

Appellant's theory narrowed during the charge conference when he explained that *Goforth v. State* required a charge "as to the knowledge of the accused person knowing that there was an accident or event[.]"[25] Counsel's description of the evidentiary support for the instruction included the expert's testimony about the reasonable mistake of fact appellant held when he believed that something had been thrown, hurled, or hit his truck other than a person or a vehicle.[26] Counsel's arguments and proposed instruction, though, confined the requested instruction to one that asked the jury to decide if appellant reasonably believed he was not in an accident because he thought someone threw something at him, and whether that belief was reasonable.[27] He continually confined the requested instruction to one which asked jurors to assess his mistaken belief that he had not been in an accident.[28]

Appellant did not present to the trial court a specific request for a mistake-of-fact instruction seeking for the jury to determine whether he reasonably believed at the time of the offense that he been in an accident, but did not believe it was the type of accident reasonably likely to injure or kill someone.[29] In support for his requested instruction about not knowing he was in an accident, he cited to evidence

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[25] (RRV-90).
[26] (RRV-91).
[27] *See* (RRV-92).
[28] *See* (CR-388-389; RRII-8); *see also* (RRV-92, 93) (requesting inclusion of the Requested Jury Instruction from the Court's record).
[29] *See* (CR-388-389; RRV-90-93).

from the State's expert that "he could see how a person could make a reasonable mistake…of fact to believe that something had been thrown, or an object hurled, or something had hit, that other than a person or a vehicle."[30] But he cited to the evidence only as support for his theory that he mistakenly believed no accident occurred.[31] Acknowledgment of an accident without a reasonable belief he injured someone was simply not the theory presented in the trial court as the basis for the mistake-of-fact instruction, and he did not present it in the written instruction the trial judge refused to include in the jury charge.[32]

The State argued in its merit brief counsel's comment consisted of a request for a mistake-of-fact instruction about a mistaken belief he had not struck a person or vehicle, but upon further review and assessment the record does not support that conclusion. The comment came when discussing what the State's expert testified to, not as a specifically requested mistake-of-fact instruction utilizing that belief as the mistaken fact he wanted included in the jury charge.[33] Instead, the record contains only one specifically requested instruction on mistake of fact, and throughout the mistaken fact appellant identified was a mistaken belief that the

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[30] (RRV-91).

[31] *See* (CR-388-389; RRV-90-91, 92) (arguing throughout that knowledge he had been in an accident was required to prove guilt, it constituted the *mens rea*, and citing to "other than a person or vehicle" as evidentiary support for his explanation that appellant remained unaware of his involvement in an accident when he left the scene).

[32] *Id*.

[33] (RRV-90-92).

damage was caused by something other than an accident when he thought someone threw something at his truck.[34]

IV. Because the mistaken belief appellant proffered in the trial court does not comport with the reason this Court found in favor of the instruction, appellant did not preserve error to a mistaken belief that he did not know the accident was reasonably likely to have injured or killed someone.

In *Posey v. State*, *Tolbert v. State*, and *Mays v. State*, this Court held that an appellant who changed the reasoning or theory behind the defensive request between the claims made in the trial court and the theory offered on appeal had not preserved error.[35] It did so because the Texas Rules of Appellate Procedure require preservation not only of the objection, but the basis for the ruling requested in the trial court to complain about the matter on appeal.[36] This Court's reversal under a theory that appellant had a mistaken belief that he did not hit a person while still realizing he had been in an accident would effectively give him a second bite at the apple on a theory he did not present as a basis for the instruction in the trial court.[37]

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[34] (RRV-90-93; CR-388-389).

[35] *See Mays*, 318 S.W.3d at 382-83 (holding failure to include in the mistake-of-fact request the specific fact mistaken did not properly preserve the request); *Tolbert*, 306 S.W.3d at 780, n. 6 (describing the intent behind *Posey* to be the avoidance of sandbagging the trial judge by presenting a new defensive theory on appeal than the one provided in the trial court); *Posey*, 966 S.W.2d at 63 (holding defensive instructions must be requested to avoid a defendant laying behind the log by allowing for retrial on a new defensive theory proffered for the first time on appeal).

[36] *See id.*; *see also* Tex. R. App. P. 33.1.

[37] *See id.*; *see also* (CR-388-389; RRII-8, 12; RRV-90, 91) (arguing throughout that appellant did not know he had been in an accident and instead mistakenly believed road debris or someone hurled something at his truck); *Curry*, slip op. at 17 (finding

This Court's holding that appellant admitted to knowledge of an accident, but mistakenly believed it was not one where someone was reasonably likely to have been injured or killed does not comport with his defensive request in the trial court.[38] He carefully limited the request to an instruction asking the jury to determine if appellant believed he was in an accident and specifically whether he reasonably, but mistakenly, believed someone threw an object that struck his truck.[39]

Unlike many, appellant in this case proffered a written, proposed jury instruction to the trial judge.[40] The written instruction made no reference to a claim that appellant did not know the accident involved a person, but instead presented the narrower mistaken belief that he did not realize he had been in an accident, the first of the two *mens rea* elements of failure to stop and render aid.[41] And appellant's attorney repeatedly clarified his theory to the trial judge as the mistaken belief he was not in an accident.[42]

Because the written request and argument claimed the mistaken belief that no accident occurred, the trial judge assessed only the evidentiary support for that

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the mistaken belief in support of giving the instruction was a potentially reasonable, but mistaken, belief that he had not struck a person or been in an accident where a person was reasonably likely to have been injured or killed).

[38] (CR-388-389; RRII-8, 12; RRV-90, 91).

[39] (CR-388-389).

[40] (CR-388-389).

[41] (CR-388).

[42] (CR-388-389, RRV-90, 92).

particular mistaken belief.[43] But this Court's reversal rested on a different mistaken fact, the degree of possible injury that might result from the accident, not the "no accident" mistaken fact appellant claimed in the trial court.[44]

Preservation of error is a systemic requirement on appeal.[45] "If an issue has not been preserved for appeal, neither the court of appeals nor…t[he] Court [of Criminal Appeals] should address the merits of that issue."[46] Preservation includes comportment between the requested instruction in the trial court and the one claimed on appeal.[47]

Yet, the mistaken fact appellant claimed in the trial court lacked evidentiary support because as this Court acknowledged, he admitted that he was in an

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[43] *Compare* (CR-388-389; RRV-90, 91-93) *with Curry*, slip op. at 16 ("Consequently, the question is not whether Curry knew that he was involved in some kind of accident (he admitted that he was); it is whether he made a reasonable mistake in thinking that no one involved in the accident was injured or killed or in thinking that the accident was not reasonably likely to have injured or killed another person.").

[44] *Compare Curry*, slip op. at 16 ("[T]he question is not whether Curry knew that he was involved in some kind of accident (he admitted that he was); it is whether he made a reasonable mistake in thinking that no one involved in the accident was injured or kill[.]") *with* (CR-388-389; RRV-90, 92).

[45] *Ford v. State*, 305 S.W.3d 530, 532 (Tex. Crim. App. 2009) (citing *Haley v. State*, 173 S.W.3d 510, 515 (Tex. Crim. App. 2005)).

[46] *Id*. (citing *Haley*, 305 S.W.3d at 515).

[47] *See Mays*, 318 S.W.3d at 382-3 (preventing sandbagging by requiring specific defense request that includes a description of why the moving party is entitled to it); *Goff*, 931 S.W.2d at 551 (Tex. Crim. App. 1996) ("Where his trial objections do not comport with his arguments on appeal, appellant has failed to preserve error on those issues."); *Satterwhite*, 858 S.W.2d at 430 (finding lack of comportment between trial court request and appellate argument preserved nothing for review).

accident.[48] The trial court did not err by refusing his requested instruction for a "no accident" mistake-of-fact instruction because the record simply did not support it.[49] Whereas, even with evidentiary support for a mistaken belief that he did not know the accident was likely to have injured someone, the trial court correctly refused the instruction when appellant did not request a mistake-of-fact instruction on that basis.[50]

Appellant did not request that particular instruction, and his comments and requests in the trial court would not have put it on notice that he wanted that particular mistake-of-fact instruction. Appellant did not ask the trial judge to rule on whether he was entitled to a mistake-of-fact instruction for a mistaken belief that he understood he was in an accident, but did not realize it was the type of accident that was reasonably likely to injure or kill someone.[51] He did not preserve error in the trial court for that instruction, and thus it may not support a basis for reversal.

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[48] *Id*.

[49] *See Granger v. State*, 3 S.W.3d 36, 38 (Tex. Crim. App. 1999) ("If the evidence viewed in a light favorable to appellant does not establish a mistake of fact defense, an instruction is not required.").

[50] *Compare* (CR-388-389; RII-8, 12; RRV-90, 91) *with Curry*, slip op. at 16-17 ("If the jury concluded that Curry reasonably believed that he was not involved in an accident that injured or killed someone, or that he reasonably believed he was not involved in an accident that was reasonably likely to injure or kill someone, that would negate the necessary *mens rea* to find Curry guilty of failure to stop and render aid.").

[51] *See Curry*, slip op. at 16-17.

Appellant's objection and requests in the trial court do not comport with the mistaken belief this Court identified as the one with evidentiary support for the instruction.[52] Because the mistaken belief identified by this Court required knowledge of an accident, but the mistaken belief appellant claimed in the trial court denied that very same knowledge, the lack of comportment warrants further review.[53] Appellant may not succeed on appeal alleging a mistaken belief he did not claim in the trial court.[54] The State respectfully urges this Court to sustain its sole ground for rehearing to address comportment.

PRAYER

The State respectfully requests that this Court sustain its ground for rehearing, consider the comportment issue, and affirm the First Court of Appeals' judgment because it properly analyzed the particular mistaken belief appellant complained of in the trial court.

KIM OGG
District Attorney
Harris County, Texas

[52] *Compare* (CR-388-389; RII-8, 12; RRV-90, 91) *with Curry*, slip op. at 16-17 ("If the jury concluded that Curry reasonably believed that he was not involved in an accident that injured or killed someone, or that he reasonably believed he was not involved in an accident that was reasonably likely to injure or kill someone, that would negate the necessary *mens rea* to find Curry guilty of failure to stop and render aid.").

[53] *See Goff*, 931 S.W.2d at 551 (Tex. Crim. App. 1996) (citing *Satterwhite*, 858 S.W.2d at 430).

[54] *See id.*

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CERTIFICATE OF SERVICE AND WORD LIMIT COMPLIANCE

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